

PRIVACY IN FLORIDA: PERSONAL AUTONOMY AND LIBERTY

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This paper is an initial analysis, as part of a larger study, of the history and long-term effect of Florida's Privacy Amendment. The focus of this analysis is the scope of the Privacy Amendment's protection of personal autonomy and liberty. This issue is distinct from the amendment's protection against intrusions relating to personal information. The Privacy Amendment does much more than protect Floridian's private information.

In 1980, Floridians approved the following Privacy Amendment to the Florida Constitution: "Every natural person has the right to be let alone¹ and free from governmental intrusion into the person's private life."² The sponsors and legislative support for the resolution included a bi partisan cross section of the legislature that made up the three-fifths super majority necessary to place CS for HJR 387 on the 1980 ballot. The Privacy Amendment was passed by a vote of 1,722,997 (60.60%) to 1,120,302 (39.40%).

Interpreting the Privacy Amendment, the Florida Supreme Court has recognized a *fundamental* right to privacy in Florida³ that is broader and more protective than the federal right to privacy offered by the Fourteenth Amendment to the U.S. Constitution.⁴ Whereas the Fourteenth Amendment's liberty protections extend to specific "zones of privacy"⁵ (e.g., marriage,⁶ procreation,⁷ contraception,⁸ abortion,⁹ family relationships,¹⁰ and child rearing and education¹¹), Florida's Privacy Amendment "extends to all aspects of an individual's private life..., and it ensures that the state cannot intrude into an individual's private life absent a compelling interest."¹²

The Florida standard for privacy is broader than the less-defined federal standard. The Florida standard for privacy demands that government justify any intrusion into one's privacy with (1) a compelling state interest and (2) the least intrusive means to accomplish that compelling state interest. The addition of Florida's Privacy Amendment undoubtedly enhances Floridians' right to protect themselves from a broad range of governmental intrusions.

Although the Florida Constitution offers a fundamental right to privacy, that fundamental right is not absolute. First, Florida's Privacy Amendment only protects a person's private life from governmental intrusions, not private and commercial intrusions.¹³ Second, Florida's Privacy Amendment does not protect against all governmental intrusions, but against those governmental intrusions that violate a person's legitimate reasonable expectation of privacy.¹⁴ If a person has a legitimate reasonable expectation of privacy, then Florida courts will inquire into "whether a compelling interest exists to justify that intrusion and, if so, whether the least intrusive means is being used to accomplish the goal."¹⁵

Under this legal framework for Florida's Privacy Amendment, protection from governmental intrusion is usually sought in one of two areas: (1) personal autonomy and (2) disclosure of information.¹⁶ This Paper is only concerned with the first category: personal autonomy. The umbrella of personal autonomy covers a swath of family, medical, and employment issues, including: marriage, sexual practices,¹⁷ procreation, contraception, sterilization, rearing and education of children, parental versus grandparental rights,¹⁸ abortion,¹⁹ life-sustaining measures,²⁰ physician-assisted suicide,²¹ consent to treatment,²² hiring practices,²³ licensing,²⁴ lewdness and obscenity,²⁵ and more.²⁶

Florida Supreme Court Justice Ben F. Overton has acknowledged that Florida's Privacy Amendment "has had its greatest effect on Floridians in the area of personal autonomy protection."²⁷ However, Justice Overton and a number of legal scholars have underscored the

malleability of Florida's Privacy Amendment, which is regularly subject to legislative actions and judicial interpretation.

In 1998, Daniel R. Gordon examined the proposals before Florida's 1997-1998 Constitution Revision Commission (CRC) to amend Florida's Privacy Amendment.²⁸ Of the six-hundred ninety-five proposed changes to the Florida Constitution, twenty-nine proposals were aimed at Florida's Privacy Amendment, and eighteen of those twenty-nine proposals sought to affect personal autonomy protections.²⁹ More than half of these eighteen proposals dealt with abortion, and the others dealt with family protections; minors' right to privacy and right to assemble; physician-assisted suicide; life-sustaining measures; access to employment and benefits; and same-sex marriage.³⁰ None of these proposals were approved by the CRC.

CATEGORIES OF PRIVACY RELATED TO PERSONAL AUTONOMY

The following categories offer a context to define current and future privacy interests that may be considered under the personal autonomy aspect of Florida's Privacy Amendment. These categories have evolved from the "right to be let alone" in the context of governmental intrusions. Both these categories and the definition of the "right to be let alone" will constantly evolve. Overall, the concepts deal with the protection of personal space and personal decision-making balanced against governmental interests.

1. Marriage – The issue of marriage, and issues related to marriage, are viewed as personal and therefore protected against governmental intrusion. It is noteworthy that the right to marry has evolved substantially. In 2015, the U.S. Supreme Court recognized a right to same-sex marriage.³¹ Florida challenged this right in federal litigation and lost.³² Floridians have not challenged marriage-related laws in Florida's state court system, but it follows that the personal autonomy aspects of Florida's Privacy Amendment could be implicated in such challenges.
2. Sexual Practices – Sexual activity has always been viewed as a personal and intimate matter. Nonetheless, Florida and other states have sought to and have prohibited certain forms of intimate sexual conduct. Florida courts have recognized that there are personal autonomy aspects of Florida's Privacy Amendment that are applicable to statutes involving certain sexual activity involving minors.³³ The Florida Supreme Court also considered whether Florida's Privacy Amendment was applicable in a case involving a statute prohibiting certain acts with obscene materials, e.g. pornography.³⁴ Without Florida's Privacy Amendment, it is unclear what standard Florida courts will apply in similar cases.
3. Reproduction – Choices relating to child bearing are inherently personal choices. However, there are instances where states have intervened. The *Buck* case stands out. There the U.S. Supreme Court justified sterilization to prevent "three generations of imbeciles."³⁵ What if there are genetic indicators for violent or criminal behavior? Could genetic modification be required or permitted by legislation if privacy protections were withdrawn from this area?

4. Parenting – A parent’s ability to make decisions about one’s own children has been recognized in areas such as discipline, education, and health care as having both liberty and privacy interests. Florida courts have recognized that Florida’s Privacy Amendment protects parenting decisions from grandparental interference. Florida courts have found unconstitutional statutes and local law providing for grandparental rights, reasoning that grandparents cannot intervene in parental decisions unless there is a compelling interest in preventing demonstrable harm to a child from those parental decisions.³⁶ Without Florida’s Privacy Amendment, it is not clear whether federal case law would support a stringent compelling interest standard in the area of parental decisions.³⁷ A similar concern could apply to governmental intervention in parental decisions relating to home schooling and other alternative education decisions. In the 2018 legislative session, the Florida Legislature is considering HB 731, which is aimed at protecting the privacy of parents who home school their children. This bill demonstrates a legislative concern for privacy and a recognition that there may be government intrusions and a need for protection. The constitution may offer this protection as well. The longer-term issue is that the constitution can protect against future attempts to limit parental decisions to home school or seek alternative education for their children. Without Florida’s Privacy Amendment, it is not clear whether the federal privacy protections would support a stringent compelling interest standard in the area of parental educational decisions.³⁸
5. Personal Volition – Florida’s legislature has limited personal volition on decisions relating to public safety, health, morals and welfare. For example, the state has mandated motorists wear seat belts. The state can detain an individual with a contagious disease. The state can define and control lewd conduct. This issue presents a large range of unknowns for the future. Is there a public safety justification for requiring implantation of identification chips or a requirement for universal identification cards or a legislative mandate that motorcyclists’ wear safety helmets? Is constant surveillance of certain neighborhoods with drones justifiable? At what point does surveillance of the public violate Florida’s Privacy Amendment by restricting personal volition?
6. Activities in Dwellings & Other Personal Space – Some protections for private conduct within the sanctity of the home are allowed in a free society. Two examples are personal intimate sexual practices and viewing pornography, discussed above. The right to view pornography in the home does not extend to the right to purchase pornography.³⁹ Some protections enhance barriers to surveillance of a home or protected space.
7. Medical Decisions – Personal autonomy has included the right to make certain medical decisions about oneself, e.g. abortion and refusal of life-sustaining treatment. Whereas the U.S. Supreme Court has applied standards with defined parameters in the abortion context,⁴⁰ the Florida Supreme Court has held the Florida’s Privacy Amendment requires the compelling interest standard for any governmental limitation of abortion.⁴¹ Recently, Florida’s highest court determined that a required waiting period for abortion may violate the state constitutional right to privacy.⁴² Florida courts also extend the Privacy Amendment’s compelling interest standard in the refusal of life-sustaining treatment⁴³ and consent to treatment⁴⁴ contexts. Without Florida’s Privacy Amendment, it is not clear whether the federal right to privacy would provide such a stringent standard for limiting

governmental intrusion into a person's private medical decisions including such other personal decisions as living wills and advanced directives.

8. Public Employment & Licensing Standards – In licensing and employment the state may have a compelling interest in personal details and practices of individuals. For example, mental health and emotional stability may be an issue in licensing lawyers. A history of smoking may be an issue in hiring public employees. However, what if certain genetic characteristics were part of licensing or employment background requirements and the state required genetic testing before hiring? Could government refuse to hire a person who engaged in otherwise legal off duty conduct such as smoking or drinking alcohol? Florida's Privacy Amendment ensures that in licensing and employment, the government show a compelling state interest and utilize the least intrusive means to satisfy that interest.

THE FUTURE

If Florida's Privacy Amendment did not extend protections to personal autonomy and decision making, there is no doubt that Florida citizens would be subject to a higher possibility of governmental intrusion in their private lives. The Florida Supreme Court has stated that Florida's explicit right to privacy extends beyond the zones of privacy protected by the implicit federal right to privacy. There is a federally-recognized zone of privacy, but Florida's is more extensive – due to its state constitutional provision. In other words, Florida's Privacy Amendment can protect extra zones of privacy if the government seeks to intrude on Floridian's private lives. When this occurs, the government will have to justify any intrusions by showing a compelling state interest and that the government is using the least intrusive means to accomplish that compelling state interest.

While future intrusions cannot be predicted with certainty, there is no doubt that advancing technology will provide opportunities to for the state to intrude into one's private life. Here are some potential examples:

1. Anticipatory policing through artificial intelligence. Analyzing social media to predict criminal behavior leading to unwarranted surveillance. Technology is increasingly able to predict behavior. Limitations on collections of certain information are enhanced by the privacy provision.
2. Genetic testing and screening for public health and safety interests, including employment. Genetics can predict health issues that can be helpful or intrusive. For the helpful issues, citizens should have personal choice as to whether to pursue them. For the intrusive issues, government should not be able to force genetic inquiry. For example, should all children be required to undergo genetic testing to screen for certain predispositions to disease, aggression, or other undesirable traits?
3. Mandating medical treatments and restrictions. Government has compelled or mandated certain treatments in the past. Obviously, there were excesses in the past such as sterilization of developmentally disabled -- a shocking intrusion that occurred in the United States. Again, the future is not predictable.
4. Determining parentage with new reproductive technologies. Individuals have been making decisions on reproduction utilizing rapidly evolving scientific options for

- genetic choices and modifications. Without a right to personal autonomy, what sorts of governmental policies might be implicated?
5. Chip Implantation or Universal ID Cards for public safety and security purposes. Does the government have a compelling state interest to institute more sophisticated forms of identification to promote public safety and welfare?
 6. Child rearing, e.g. limiting parental rights to home-school or other alternative education. As stated above, current legislative proposals are focused on protecting privacy of parents in a home school setting. Without the Privacy Amendment, there would be lesser protections for parental decision-making in the educational context if the government changed course and sought to intrude on this space. The right of parenting is certainly an issue that is constitutionally protected by the Privacy Amendment.
 7. Drone Surveillance of certain locations or areas. The government already utilizes closed circuit television (CCTV) to observe large areas of public space. Red light cameras have been broadly used. New technology for observation, such as drones and location-tracking license plate readers, are being invented and refined. At some point general surveillance becomes a violation of privacy. GPS monitoring of individuals and constant CCTV observation of private dwellings are technologically possible.

Florida's Privacy Amendment, adopted by the voters and added to our State's Constitution in 1980, provides specific and strong protections against governmental intrusions into the private lives of individuals. The future implementation and precise effect of this fundamental right is as hard to predict as the future of technology. We cannot know. We can reliably hypothesize that technology will continue to present options and opportunities for governmental intrusion from drones to personal biometric identifiers to projections of individual conduct based on genetic assessments. We cannot know what government will do in the future either. We know that governments have been unreasonably intrusive in the past, even a U.S. government that upheld compulsory sterilization, a decision that has never been specifically overturned. Other intrusions have been overturned such as criminalizing sodomy and interracial marriage.

The federal interpretation of privacy and personal liberty have evolved to protect certain spheres of personal autonomy. But there is no doubt that Florida's privacy right, as a fundamental right that compels government to justify its intrusions with a compelling interest, is more extensive and better able to protect the individual. Florida's Privacy Amendment offers Floridians a shield to protect themselves in a future in which technology and government intrusions are not predictable and frankly, completely unknowable.

Jon Mills was a co sponsor of HJR 387 , the resolution that proposed the Article I section 23 right of privacy in the Florida Constitution in 1980. He has been counsel in high-profile privacy litigation, including protecting privacy rights of the families the victims of the Rolling murders, the families of Dale Earnhardt, Gianni Versace, Dawn Brancheau (the trainer who died in an accident at SeaWorld), and others. His work included serving as counsel to the CEO of a major corporation in a case that successfully prevented disclosure of sensitive information. He has a history of success dealing with complex and critical legal problems. He is a recognized international expert on privacy and cybersecurity who has written multiple books and articles on privacy and security including: “*Privacy in the New Media Age*” and “*Privacy the Lost Right*” (Oxford University Press). As a University of Florida Law Professor he has taught Privacy and Cybersecurity classes. He has also taught privacy to judges and lawyers worldwide, lectured in Latin America as part of the U.S. Department of State’s Speakers Program, and presented continuing legal education courses on privacy and security to corporate leadership and general counsel. He has appeared in courts throughout the US including more than 40 appearances in the Florida Supreme Court. He was a member of the 1998 Constitution Revision Commission and Chair of its Style and Drafting Committee.

¹ See Samuel D. Warren & Louis D. Brandeis, *The Right to Privacy*, 4 HARV. L. REV. 193 (1890).

² FLA. CONST. art. I, sect. 23; see Jon Mills, *Sex, Lies, and Genetic Testing: What Are Your Rights to Privacy in Florida?*, 48 FLA. L. REV. 813, 825 (1996). Prior to 1980, the Florida Constitution did not provide a general state constitutional right to privacy. See *Shevin v. Byron, Harless, Schaffer, Reid & Associates, Inc.*, 379 So. 2d 633 (Fla. 1980) (“Any possible confusion arising from these prior cases should have been dispelled by our later decision in *Laird v. State*, 342 So.2d 962 (Fla.1977), wherein it was made clear that Florida has no general state constitutional right of privacy.”). Florida’s 1978 CRC attempted to amend the Florida Constitution by placing a privacy amendment on the 1978 ballot, but the measure was part of a package that was defeated. See Mills, *Sex, Lies, and Genetic Testing*, at 825.

³ See *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243, 1246 (Fla. 2017); *State v. J.P.*, 907 So. 2d 1101, 1110 (Fla. 2004); *Von Eiff v. Azicri*, 720 So. 2d 510, 514 (Fla. 1998); *City of North Miami v. Kurtz*, 653 So. 2d 1025, 1027 (Fla. 1995); *Winfield v. Division of Pari-Mutuel Wagering, Dept. of Business Regulation*, 477 So. 2d 544, 547 (Fla. 1985).

⁴ *Gainesville Woman Care, LLC*, 210 So. 3d at 124; *Winfield*, 477 So. 2d at 547–48 (Fla. 1985); see *Griswold v. Connecticut*, 381 U.S. 479 (1965) (recognizing an implicit right to privacy under the “liberty” protections of the Fourteenth Amendment to the U.S. Constitution).

⁵ *Roe v. Wade*, 410 U.S. 113, 152 (1973).

⁶ See *Obergefell v. Hodges*, 576 U.S. ___ (2015); *Loving v. Virginia*, 388 U.S. 1 (1967).

⁷ See *Skinner v. Oklahoma ex rel. Williamson*, 316 U.S. 535 (1942); *Buck v. Bell*, 274 U.S. 200 (1927).

⁸ See *Eisenstadt v. Baird* 405 U.S. 438 (1972).

⁹ See *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe*, 410 U.S. 113.

¹⁰ See *Prince v. Massachusetts*, 321 U.S. 158 (1944).

¹¹ *Cleveland Board of Education v. LaFleur*, 414 U.S. 632 (1974); *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).

¹² Honorable Ben F. Overton & Katherine E. Giddings, *The Right of Privacy in the Age of Technology and the Twenty-First Century: A Need for Protection from Private and Commercial Intrusion*, 25 FLA. ST. U. L. REV. 25, 40–1 (1997).

¹³ See *North Miami v. Kurtz*, 653 So. 2d 1025, 1027-29 (Fla. 1995); see also, Overton & Giddings, *supra* note 12, at 40–41. For private and commercial intrusions into a person’s private life, a person can seek redress through one of three common law invasion of privacy torts recognized by the Florida Supreme Court: (1) appropriation; (2) intrusion, and (3) public disclosure of private facts. *Allstate Ins. Co. V. Ginsberg*, 863 So. 2d 156, 162 (Fla. 2003). However, the Florida Supreme Court expressly rejected a fourth common law invasion of privacy tort: false light invasion in the public eye. *Jews for Jesus, Inc. v. Rapp*, 997 So. 2d 1098, 1114 (Fla. 2008).

¹⁴ See *Kurtz*, 653 So. 2d at 1027-29 (finding no legitimate reasonable expectation of privacy where applicant did not want to disclose smoking habits on municipal job application); *Stall v. State*, 570 So. 2d 257, 260 (Fla. 1990) (finding no reasonable expectation of privacy “in being able to patronize retail establishments for the purpose of purchasing [obscene] material”); see also Overton & Giddings, *supra* note 12, at 35–6.

¹⁵ *Kurtz*, 653 So. 2d at 1028.

¹⁶ See Daniel R. Gordon, *Upside Down Intentions: Weakening the State Constitutional Right to Privacy, A Florida Story of Intrigue and a Lack of Historical Integrity*, 71 TEMPLE L. REV 579 (1998) (distinguishing between behavioral, i.e. personal autonomy, and informational privacy protections).

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- ¹⁷ See *B.B. v. State*, 659 So. 2d 256 (Fla. 1995); *Jones v. State*, 640 So. 2d 1084 (Fla. 1994); *State v. J.A.S.*, 686 So. 2d 1366 (Fla. 5th DCA 1997).
- ¹⁸ See *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998); *Beagle v. Beagle*, 678 So. 2d 1271, 1275-77 (Fla. 1996).
- ¹⁹ See *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017); *North Florida Women’s Health and Counseling Services, Inc. v. State*, 866 So. 2d 612 (Fla. 2003); *In re T.W.*, 551 So. 2d 1186 (Fla. 1989).
- ²⁰ See *In re Guardianship of Browning*, 568 So. 2d 4, 9-14 (Fla. 1990); *In re Guardianship of Schiavo*, 800 So. 2d 640 (Fla. 2d DCA 2001).
- ²¹ See *Krischer v. McIver* 697 So. 2d 97 (Fla. 1997).
- ²² See *In re Dubreuil*, 629 So. 2d 819 (Fla. 1993); *M.N. v. Southern Baptist Hosp.*, 648 So. 2d 769, 771 (Fla. 1st DCA 1994); *Rodriguez v. Pino*, 634 So. 2d 681, 688 (Fla. 3d DCA 1994).
- ²³ See *City of North Miami v. Kurtz*, 653 So. 2d 1025 (Fla. 1995).
- ²⁴ See *FL Board of Bar Examiners re: Applicant*, 443 So. 2d 71 (Fla. 1983).
- ²⁵ See *Stall v. State*, 570 So. 2d 257 (Fla. 1990); *State v. Conforti*, 688 So. 2d 350 (Fla. 4th DCA 1997).
- ²⁶ See also *State v. J.P.*, 907 So. 2d 1101 (Fla. 2004).
- ²⁷ *Overton & Giddings*, *supra* note 12, at 38–9.
- ²⁸ *Gordon*, *supra* note 16, at 586–87.
- ²⁹ *Id.*
- ³⁰ *Id.*
- ³¹ *Obergefell v. Hodges*, 576 U.S. ___ (2015).
- ³² *Brenner v. Scott*, 2016 WL 3561754 (N.D. Fla. Mar. 30, 2016) (declaring unconstitutional Florida constitutional provision and statutes banning same-sex marriage).
- ³³ See *B.B. v. State*, 659 So. 2d 256 (Fla. 1995) (holding statute constitutional as applied); *Jones v. State*, 640 So. 2d 1084 (Fla. 1994) (holding statute constitutional).
- ³⁴ *Stall v. State*, 570 So. 2d 257 (Fla. 1990); *but see*, *Stanley v. Georgia*, 394 U.S. 557 (1969).
- ³⁵ *Buck v. Bell*, 274 U.S. 200 (1927).
- ³⁶ *Von Eiff v. Azicri*, 720 So. 2d 510 (Fla. 1998); *Beagle v. Beagle*, 678 So. 2d 1271, 1275-77 (Fla. 1996).
- ³⁷ See *Prince v. Massachusetts*, 321 U.S. 158 (1944).
- ³⁸ See *Pierce v. Society of Sisters*, 268 U.S. 510 (1925); *Meyer v. Nebraska*, 262 U.S. 390 (1923).
- ³⁹ See cases cited *supra* note 34 and accompanying text.
- ⁴⁰ *Planned Parenthood v. Casey*, 505 U.S. 833 (1992); *Roe v. Wade*, 410 U.S. 113 (1973).
- ⁴¹ *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017); *North Florida Women’s Health and Counseling Services, Inc. v. State*, 866 So. 2d 612 (Fla. 2003); *In re T.W.*, 551 So. 2d 1186, 1189-96 (Fla. 1989).
- ⁴² *Gainesville Woman Care, LLC v. State*, 210 So. 3d 1243 (Fla. 2017).
- ⁴³ *In re Guardianship of Browning*, 568 So. 2d 4, 9-14 (Fla. 1990); *In re Guardianship of Schiavo*, 800 So. 2d 640 (Fla. 2d DCA 2001).
- ⁴⁴ *In re Dubreuil*, 629 So. 2d 819 (Fla. 1993); *M.N. v. Southern Baptist Hosp.*, 648 So. 2d 769, 771 (Fla. 1st DCA 1994); *Rodriguez v. Pino*, 634 So. 2d 681, 688 (Fla. 3d DCA 1994).